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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 980

ORLEANS PARISH SCHOOL BOARD,
Petitioner,

versus

EARL BENJAMIN BUSH, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Orleans Parish School Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on March 1, 1957.

CITATIONS TO OPINIONS BELOW.

The *per curiam* opinion of the United States District Court for the Eastern District of Louisiana sitting as a three-judge court is reported in 138 Fed. Supp. 336 and

is printed in Appendix "B" hereto, page 26. The opinion and decree of the United States District Court for the Eastern District of Louisiana sitting as a one-judge court, Honorable J. Skelly Wright presiding are reported in 138 Fed. Supp. 337 and are printed in Appendix "B" hereto, page 29. The opinion and decree of the United States Court of Appeals for the Fifth Circuit rendered and entered March 1, 1957 are as yet unreported and are printed in the Appendix "B" hereto, page 38.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 1, 1957 (Tr. p. 175). Rehearing was denied on April 5, 1957 (Tr. p. 198). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. In an application for rehearing *en banc* under authority of 28 U. S. C. 46 (c) conferring the *en banc* power upon the majority of the active members of the Court of Appeals, where no delegation of authority has been made, may the panel of three judges hearing the case exercise this power or is the power reposed in the entire court, the majority thereof controlling?

2. May a court assume the unconstitutional administration of a state law prior to any application thereunder, thereby relieving the complainant of the necessity of exhausting the administrative remedies set forth in said statute?

3. May a federal court declare a state statute, constitutional on its face, invalid on the assumption that it will be unconstitutionally administered?

4. May a three-judge district court convened under authority of 28 U. S. C., Section 2281 for the purpose of determining the validity of certain provisions of a state's constitution and statutes withdraw from the case on the ground that the constitutional provisions and statutes are obviously unconstitutional and therefore no serious constitutional question is presented, and thereafter a one-judge district court issue an opinion declaring said constitutional provisions and statutes unconstitutional and enjoining their enforcement?

5. Is a suit against a state official acting under authority of a state statute alleged to be unconstitutional a suit against the state within the meaning of the Eleventh Amendment of the United States Constitution where the relief prayed for will require affirmative action on the part of the state?

6. May a court go beyond the pleadings and declare an entire state statute unconstitutional when only one section thereof has been challenged?

7. Is the decision of this Court in *Brown v. Board of Education of Topeka*, 349 U. S. 294, 75 S. Ct. 753, 98 L. Ed. 873, controlling in determining the constitutionality of the provisions of a state's constitution and statutes when the facts presented are substantially different from the facts in cited decision?

STATUTES INVOLVED.

28 U. S. C., Section 46, 62 Stat. 968, providing for *en banc* hearing by Courts of Appeal, printed herein Appendix "A" at page 17. 28 U. S. C., Section 2281, 62 Stat. 968, providing for three-judge court in injunction suit against enforcement of state statute, printed herein

Appendix "A" at page 17. Constitution of State of Louisiana, 1921, Article XII, printed herein Appendix "B" at page 18. Louisiana Revised Statutes of 1950, Title 17, Section 331 through 334 (Acts of 1954, No. 555, paragraphs 1 through 5) printed herein Appendix "B", page 19. School Assignment Law of Louisiana, L. R. S. of 1950, Section 17:81.1 (Acts of 1954, No. 556, paragraph 1) printed here in Appendix "B" at page 20.

STATEMENT.

Respondents herein filed a complaint in the United States District Court for the Eastern District of Louisiana on September 5, 1952 against Orleans Parish School Board and its acting superintendent, seeking a declaratory judgment and permanent injunction under Title 28, U. S. C., Sections 2201 and 2202. In this complaint they alleged that the Defendant's (petitioner herein), "policy, custom, practice and usage" in refusing to allow Negro children to attend elementary and secondary public schools in the Parish of Orleans, was in effect a denial of equal facilities for the reason that white children were afforded educational opportunities, advantages and facilities far superior to those afforded Negroes and therefore was in violation of the equal protection clause of the Fourteenth Amendment; wherefore they prayed that a three-judge court be convened to declare Article 12, Section 1 of the Louisiana Constitution unconstitutional and permanently enjoin petitioner from denying equal facilities to respondents (and all Negroes similarly situated, as this was designated a class action) because of race. (Tr. pp. 2-16).

Some three years later on August 18, 1955, respondents filed a motion for a temporary injunction restrain-

ing petitioner from putting into effect the following article of the Constitution of Louisiana and state statutes: Article 12, Section 1 of the Constitution; Sections 81.1 (School Assignment Law), and 331 (separate operation of schools under police power of State) of Title 17 of the Louisiana Revised Statutes. (Tr. pp. 16-18). Just two days later, August 20, 1955, respondents filed a document designated First Amended Complaint, in which they again asked that a three-judge court be convened and issue a temporary injunction and ultimately a permanent injunction restraining petitioner from enforcing the aforesaid constitutional provision and the aforesaid State Statutes, and a declaration of unconstitutionality for all on the hypothesis that segregation, even with equal facilities, would cause irreparable injury and therefore was violative of the Fourteenth Amendment. (Tr. pp. 19-30).

Numerous motions to dismiss the complaint were filed on behalf of the petitioner, (Tr. pp. 37-39), and the State of Louisiana appearing solely for the purpose of objecting to the jurisdiction of the court filed a motion to dismiss for want of jurisdiction. (Tr. pp. 34-36). Thereafter, a three-judge court was convened by the chief judge of the Court of Appeals for the Fifth Circuit, composed of Honorable Wayne G. Borah, Honorable Herbert W. Christenberry, and Honorable J. Skelly Wright (Tr. pp. 39, 40). In accordance with the order of this three-judge court, on December 2, 1955, oral arguments were presented to the court on motions to dismiss and hearing had on the application for preliminary injunction, at which time petitioner introduced uncontroverted affidavits of a large number of accredited medical and educational authorities who were in unanimity in concluding that the

Negro would not suffer injury by separate school facilities but indeed three grave consequences would arise if integration of the public schools were ordered: (1) Negro students would sustain lasting psychiatric trauma by integration; (2) Educational progress of both Negro and white students would seriously be impaired; (3) integration would present a serious moral and health hazard to white children.

However, on February 15, 1956, the three-judge district court filed a *per curiam* opinion in which, apparently without passing on the constitutionality of the specific provisions of the Louisiana State Constitution under attack, nor on the constitutionality of the challenged Louisiana Statutes, the court held that under the decision of the United States Supreme Court in *Brown v. Board of Education*, 349 U. S. 294, 75 S. Ct. 753, 98 L. Ed. 873 (1954) any provisions of the Louisiana Constitution or Louisiana Statutes which require or permit segregation of the races in public schools are invalid. The Court further held that therefore no serious constitutional question was presented and accordingly a three-judge court, under the provisions of 28 U. S. C., Section 2281 was not required, and the two judges designated to sit with the District Judge withdrew from the case. (Tr. pp. 122-123).

On the same date, February 15, 1956, the United States District Court for the Eastern District of Louisiana, New Orleans Division, sitting as a one-judge court, the Honorable J. Skelly Wright, presiding, issued an opinion in which all of petitioner's motions to dismiss, except one (allowing dismissal of Superintendent Redmond), were overruled and holding the provisions of the Louisiana Con-

stitution, (Article 12, Section 1), and of the Louisiana Statutes challenged by respondents, (La. R. S. 17:81.1, 331) and some not challenged, (La. R. S. 17:332, 333, 334), unconstitutional, and issued a decree enjoining petitioner from "requiring or permitting segregation of the races in any school under their supervision. . . ." (Tr. pp. 125-131).

Application for a rehearing was filed on the part of the State of Louisiana again reiterating their motion to dismiss for lack of jurisdiction. (Tr. pp. 133, 134). On February 24, 1956, petitioner herein filed a motion for a new trial and a rehearing predicated on ten separate allegations of error on the part of the District Court. (Tr. pp. 135-141). This motion was denied on March 8, 1956 (Tr. pp. 143, 144).

Subsequent to the denial of the motion for a new trial and rehearing, petitioner herein filed a motion for leave to file petition for writs of Mandamus and Prohibition and petition for writs of Mandamus and Prohibition with this Court in which it was prayed that a writ of Mandamus issue to the United States District Court for the Eastern District of Louisiana, sitting as a three-judge court, and to the three judges sitting thereon directing the said three-judge court and the individual judges thereon, to adjudicate as a three-judge court the issues presented by the pleadings herein. It was further prayed that a writ of Mandamus issue to the United States District Court for the Eastern District of Louisiana, sitting as a one-judge court, directing said judge to expunge from the record the opinion of March 8, 1956, holding certain provisions of the Louisiana State Constitution and Statutes of the State of Louisiana unconstitutional and the de-

cree of the same date enjoining and restraining appellants herein. And last it was prayed that a writ of Prohibition issue to the judge of the District Court prohibiting him from taking any further action in this cause unless sitting as one of the judges of the duly convened three-judge district court.

The motion for leave to file these petitions was denied by this Court in a memorandum opinion on May 28, 1956. See *Orleans Parish School Board v. Bush*, 76 S. Ct. 854 (1956).

On April 5, 1956 petitioner filed appeal with the United States Court of Appeals for the Fifth Circuit. After the submission of briefs and oral argument Circuit Judges Rivers, Tuttle and Brown on March 1, 1957 issued their opinion and entered judgment affirming the decision of the District Court (see Tr. pp. 154 and 175 and appendix hereto). Thereafter on March 23, 1957 petitioner filed a petition for rehearing and on the same date filed a Suggestion and Request for *En Banc* Consideration of Application for Rehearing and for *En Banc* Rehearing.

On April 5, 1957 the panel of circuit judges who originally heard the case entered an order denying the petition for rehearing (Tr. p. 198). No reference was made to the suggestion for *en banc* consideration of the petition for rehearing.

REASONS FOR GRANTING WRIT.

1. This Court, in *Western Pacific Ry. Corp. v. Western Pacific Ry. Co.*, 345 U. S. 247, 97 L. Ed. 983, 73 S. Ct. 656 (1953) held as follows:

> "It is essential, of course, that a circuit court, and the litigants who appear before it, understand the

practice—whatever it may be—whereby the court convenes itself en banc. In promulgating the rules governing that procedure the court should recognize the full scope of its powers under § 46 (c)."

However the Court of Appeals for the Fifth Circuit has promulgated no rules or regulations governing the procedure of the court in the exercise of its *en banc* powers under 28 U. S. C. 46 (c). Admittedly had it promulgated such regulations the court could have delegated to a panel of judges constituting a minority of the active members of the court the right to determine whether or not a matter should be heard by the court *en banc*. However, in the absence of such regulations it would appear from the principles laid down by this Court in the above cited case and from the wording of the statute itself that a suggestion for *en banc* consideration would have to be determined by the majority of the active members of a circuit. In the present instance it would appear that if any consideration whatsoever was given to petitioner's suggestion and request for *en banc* consideration of its application for rehearing such consideration was given only by the three judges who heard the case and by whose order the application for rehearing was denied. As said three judges constitute a minority of the Court of Appeals for the Fifth Circuit, it would appear that the action taken by the Court in this instance is in direct conflict with the "fundamental requirements" which "should be observed by the Courts of Appeals" as laid down by this Court in the case above cited.

2. The Court of Appeals in holding that respondents herein need not avail themselves of the provisions of the Louisiana School Assignment Laws (La. Rev. Statutes

17:81.1, Appendix "A", page 20) assumed that this statute which on its face is clear and unambiguous and in no way violative of the federal constitution would be unconstitutionally administered and therefore relieved respondents of the necessity of exhausting the administrative remedies outlined in said statute. The Court of Appeals in so holding is in conflict with two principles of law firmly imbedded in the jurisprudence of this Court. This Court has laid down the principle that federal courts are without jurisdiction to enjoin the enforcement of administrative orders where the complainant has failed to exhaust the administrative remedies afforded him by state statutes, *Porter v. The Investors Syndicate*, 286 U. S. 461, 76 L. Ed. 1226, 52 S. Ct. 617 (1931) and that parties alleging violation of rights secured by the constitution are not excepted. *Vandalia R. Co. v. Public Service Co.*, 242 U. S. 225, 37 S. Ct. 93, 61 L. Ed. 276 (1916). This Court has further repeatedly held that one cannot complain in advance of application that there is danger of refusal by an administrative authority. *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937). See also, *Rock Island Co. v. U. S.*, 254 U. S. 141, 65 L. Ed. 188, 41 S. Ct. 55 (1920); *Gilchrist v. Interborough R. T. Co.*, 279 U. S. 159, 73 L. Ed. 652, 49 S. Ct. 282 (1928).

3. The Court of Appeals for the Fifth Circuit in holding Louisiana's School Assignment Law unconstitutional on the assumption of unconstitutional administration discussed above, and on the ground that the statute fails to contain "reasonably certain or ascertainable standards to guide the official conduct of the superintendent" is in direct conflict with recent decisions of the Court of Appeals for the Fourth Circuit. The Court of Appeals for

the Fourth Circuit has in the last two years upheld the school assignment laws of N. Carolina on two occasions and on another occasion the school assignment law of S. Carolina. See *Carson v. Board of Education*, 227 F. (2d) 789 (C. C. A., 4th, 1955) wherein the Public Enrollment Act of N. Carolina, similar to and containing no more detailed standards than the Louisiana School Assignment Law was upheld (compare Session Laws of North Carolina, Session 1955, Chapter 366, Appendix "A", page 22, with Louisiana Revised Statutes 17:81.1, Appendix "A", page 20). See also *Hood v. Board of Trustees of Sumter School District No. 2*, 332 F. (2d) 626 (C. C. A., 4th, 1956), Certiorari denied, 25 Law Week 3115, upholding the School Assignment Law of S. Carolina; and *Carson v. Warlick*, 25 Law Week 2252, (C. C. A., 4th, 1957) reaffirming the prior *Carson* case and again rejecting an attack on the North Carolina statute.

It is apparent from the above that the Fourth and Fifth Circuits of the Court of Appeals are in hopeless conflict as to the validity of school assignment laws, which conflict will cause increasing confusion until the matter is reviewed and settled by this Court.

4. The one-judge district court did not have jurisdiction to hear and determine the constitutionality of the State of Louisiana's statutes and constitution. The law and the decisions of this Court make it abundantly clear that a one-judge district court does not have jurisdiction to grant an injunction upon the ground that a state statute is unconstitutional and that a three-judge district court must be convened to hear the evidence and pass upon the issues. This Court has repeatedly declared that Congress

in the enactment of Section 2281 of Title 28 of the United States Code sought to make interference by injunction "with the enforcement of state legislation a matter for the adequate hearing and full deliberation which the process of a court composed of three judges, as provided by the statute, was likely to secure". *Phillips v. United States*, 312 U. S. 246, 251-253, 85 L. Ed. 800, 805-6; *Stratton v. St. Louis Swn. Ry. Co.*, 282 U. S. 10, 14, 75 L. Ed. 135, 137; *Cumberland T. & T. Co. v. La. Public Service Commission*, 260 U. S. 212, 67 L. Ed. 217.

It is true that this Court has held that a three-judge district court need not be convened where no serious Federal question is presented, but in each such instance the challenged state statute was held to be constitutional. In every case heretofore decided by this Court the absence of a substantial constitutional question has resulted in the dismissal of the plaintiff's suit. In no case has the Court assumed jurisdiction and issued an injunction where it found that no substantial Federal question was presented. This was true in *Ex parte Poresky*, 290 U. S. 30, 75 L. Ed. 152, cited by the three-judge court as a reason for its refusal to determine the issues herein. This Court has rendered similar decisions in other cases, including: *California Water Service Co. v. City of Redding*, 304 U. S. 252, 82 L. Ed. 1323; *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16, 78 L. Ed. 1088; *Oklahoma Gas & Electric Co. v. Oklahoma Baking Co.*, 292 U. S. 386, 78 L. Ed. 1318; *Levering Co. v. Morrin*, 289 U. S. 103, 105-6, 77 L. Ed. 1062, 1064-5.

The decision of the three-judge district court in refusing to hear and determine this matter, and the de-

cision of the one-judge district court, proceeding alone to condemn the laws of Louisiana and to issue an injunction prohibiting their enforcement and the affirmation of these proceedings by the Court of Appeals represents a manifest departure from, and open conflict with, numerous decisions of this Court cited above.

5. In holding that this suit is not in fact a suit against the State of Louisiana over which Federal courts do not have jurisdiction and the citing in support of its findings the cases of *George R. and B. Co. v. Redwine*, 342 U. S. 299, 72 S. Ct. 321, and *Ex parte Young*, 209 U. S. 123, the Court of Appeals perpetuated the basic error committed by the District Court. Neither of the cases cited have application to the present litigation. In both the *Redwine* and *Young* cases the question at issue was purely a negative injunction. On the other hand the injunction issued in the present case would require affirmative action by the State of Louisiana and accordingly it comes within the purview of the ruling of this Court in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), wherein this Court held:

> "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory power, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. North Carolina v. Temple, 134 U. S. 22, 332 L. Ed. 849, 10 S. Ct. 509."

The present injunction would obviously require affirmative action by the State of Louisiana. If the public schools in Louisiana are to continue the injunctions herein would require an affirmative and complete revamping of the whole educational system of the State. Accordingly in holding that the instant case is not in fact a suit against the State of Louisiana, the Court of Appeals is in direct conflict with the decisions of this Court cited above.

6. Respondents in their First Amended Complaint attacked the constitutionality of Section 331 of Title 17 of Louisiana Revised Statutes. This Section was formerly Section 1 of Act 555 of 1954. The district court went beyond the pleadings and declared the entire Act, containing three additional sections not challenged by the pleadings, unconstitutional. This error has been perpetuated by the decision of the Court of Appeals affirming this amazing departure from the accepted and usual course of judicial proceedings. In so holding, the Court of Appeals is in direct conflict with *Reynolds v. Stockton*, 140 U. S. 254, 11 S. Ct. 773, 35 L. Ed. 464 (1891) in which this Court held that a decree which undertakes to decide issues not raised by the pleadings is void.

7. In *Brown, et al., v. Board of Education of Topeka* and the other cases consolidated with it (347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873) this Court held that segregation in the public schools in the States of Kansas, S. Carolina, Virginia and Delaware would injure the Negro plaintiffs then before this Court and "may affect their hearts and minds in a way unlikely ever to be undone." The facts in the present case, however, are sharply and clearly distinguishable from the facts in the *Brown* case

on which the Court of Appeals relied in holding Louisiana's constitutional provisions and statutes unconstitutional. The court below ignored the uncontradicted evidence that in addition to causing great danger to the health and morals of white children, integration in the public schools in the State of Louisiana would have serious and adverse psychiatric repercussions among the Negro students of this State. (Tr. pp. 53 through 120). It is submitted that the evidence shows that the facts in this case are substantially different from the facts in the School Segregation cases decided by this Court and that from the facts presented in this case the State of Louisiana took the only means at its command to protect its Negro children from psychiatric trauma and to protect the health and morals of its white children.

CONCLUSION.

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE.

I, GERARD A. RAULT, one of the attorneys for Orleans Parish School Board, petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari on the several parties thereto, as follows:

1. On A. P. Tureaud, Esquire, and A. M. Trudeau, Jr., Esq., Counsel for respondents, by mailing a copy thereof, postage prepaid, addressed to their offices at 1821 Orleans Avenue, New Orleans, Louisiana;

2. On U. Simpson Tate, Esq., Counsel for respondents, by mailing a copy thereof, air mail postage prepaid, addressed to his office at 2600 Flora Street, Dallas, Texas;

3. On Robert L. Carter, Esq., and Thurgood Marshall, Esq., Counsel for respondents, by mailing a copy thereof, air mail postage prepaid, addressed to their offices at 107 W. 43rd Street, New York 36, New York.

Dated this ..... day of May, 1957.

GERARD A. RAULT,
Attorney for Petitioner,
American Bank Building,
New Orleans, Louisiana

APPENDIX "A"

Statutes Involved

28 USC Section 46

ASSIGNMENT OF JUDGES; DIVISIONS; HEARINGS; QUORUM

* * * (c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court en banc shall consist of all active circuit judges of the circuit.

June 28, 1948, c. 646, 62 Stat. 968.

28 USC Section 2281.

INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTE; THREE-JUDGE COURT REQUIRED

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by a district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

June 25, 1948, c. 646, 62 Stat. 968.

CONSTITUTION, STATE OF LOUISIANA, 1921, ARTICLE XII.

Paragraph 1.

PUBLIC EDUCATIONAL SYSTEM; ADMISSION; BEGINNING AGE; KINDERGARTENS; SPECIAL ELECTIONS; SEGREGATION

Section 1. The Legislature shall provide for a public educational system of the State to consist of all public schools and all institutions of learning operated by State agencies and enact laws on all matters regarding the terms and qualifications for admission to the public schools. Children attaining the age of six within four months after the beginning of any public school term or session, and kindergartens may be authorized for children between the ages of four and six years.

The Legislature may designate and provide for a special election or elections, in addition to the elections provided in Article XXI, at which amendments to provisions of Article XII shall be submitted to the electors for their approval or rejection.

All public elementary and secondary schools in the State of Louisiana shall be operated separately for white and colored children. This provision is made in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the State, and not because of race. The Legislature shall enact laws to enforce the state police power in this regard. (As amended Acts 1932, No. 141, adopted Nov. 8, 1932; Acts 1944, No. 320, adopted Nov. 7, 1944; Acts 1954, No. 752, adopted Nov. 2, 1954.)

LOUISIANA REVISED STATUTES OF 1950; TITLE 17.

Section 331.

SEPARATE OPERATIONS REQUIRED

All public elementary and secondary schools in the State of Louisiana shall be operated separately for white and colored children. This provision is made in the exercise of the police power to promote and protect public health, morals, better education and the peace and good order in the state and not because of race. Acts 1954, No. 555, Section 1.

Section 332.

NON-RECOGNITION OF SCHOOLS VIOLATING SUB-PART

The State Board of Education shall not approve any public schools which may violate the provisions of this Sub-part nor shall any of the state colleges or university recognize any certificate of graduation from such public school which may violate the provisions of this Sub-part as entitling the holder thereof to admission. Acts 1954, No. 555, Section 2.

Section 333.

SCHOOLS VIOLATING SUB-PART TO BE DEPRIVED OF SUPPLIES AND FUNDS

No free school books or other school supplies shall be furnished, nor shall any state funds for the operation of school lunch programs, or any other school funds be furnished or given to any public elementary or secondary

school which may violate the provisions of this Sub-part as above. Acts 1954, No. 555, Section 3.

Section 334.

PENALTY FOR VIOLATIONS

Any person, firm or corporation violating any of the provisions of this Sub-part shall be deemed guilty of a misdemeanor and upon conviction therefor by a court of competent jurisdiction for each such violation shall be fined not less than five hundred dollars nor more than one thousand dollars, or sentenced to imprisonment in the parish jail not less than ninety days nor more than six months, or both, fined and imprisoned as above, at the discretion of the court. Acts 1954, No. 555, Section 4.

In case any part of this Act shall be held to be unconstitutional, this shall not have the effect of invalidating any part of it that is constitutional, and the part or parts not affected by such ruling shall continue in full force and effect. This Act shall be liberally construed to protect and preserve the State Police Power as provided in this Act. Acts 1954, No. 555, Section 5.

LOUISIANA REVISED STATUTES OF 1950.

17:81.1.

ASSIGNMENT OF CHILDREN TO PARTICULAR SCHOOLS BY PARISH SUPERINTENDENT; HEARINGS; REVIEW BOARD; APPEAL

Each parish superintendent of schools, throughout this state, shall, each year, determine the particular public

school within each parish to be attended by each school child applying for admission to public schools. No school child shall be entitled to be enrolled or to enter into a public school until he has been assigned thereto in accordance with the provisions of this Section. In the event of dissatisfaction with the school assignment made by the superintendent, the parents or next of kin to the child affected, within ten days from the date of assignment may apply to the school superintendent for a hearing to have said child assigned to some other public school in the parish, in which case the superintendent shall grant a hearing, and within thirty days after the conclusion of said hearing, the superintendent shall hand down a decision in writing either sustaining his school assignment in question or changing the same. The action of the parish superintendent shall be reviewable by the parish school board upon application of any person paying ad valorem taxes for the support and maintenance of the public schools or on the application of any other party in interest. Any such application for review shall be filed with the parish school board within thirty days from the day the action complained of was taken and within sixty days thereafter, said parish school board shall hold a hearing at which evidence shall be taken down and transcribed, the cost thereof to be paid for by the party making said application prior to submission of the matter to the school board. The school board shall have the right to require applicant to furnish bond for costs within a reasonable sum, properly secured, prior to the holding of said hearing. The parish school board shall consider the evidence so adduced and as soon as practicable render its decision in writing. Any person, having applied for and secured a hearing by the parish school board who feels aggrieved by the ruling

of said board shall have the right to apply to the district court of the domicile of the said board and the right to appeal from the judgment of the district court to the appropriate court of appeal, provided, however, that such right to apply to the district court shall not exist until said party shall have complied with the provisions hereof, and shall have exhausted the administrative remedies provided for herein.

Each school board throughout the state shall have authority to adopt rules and regulations governing the hearing and appeals provided for herein.

Wherever reference is made to parish superintendent of schools or school boards the same shall apply to those in the cities of Monroe, Bogalusa and Lake Charles.

Added Acts 1954, No. 556, Section 1.

SESSION LAWS OF NORTH CAROLINA
SESSION 1955

* * * * * * * * *

Chapter 366.

AN ACT TO PROVIDE FOR THE ENROLLMENT OF PUPILS IN PUBLIC SCHOOLS

The General Assembly of North Carolina do enact:

Section 1. The county and city boards of education are hereby authorized and directed to provide for the enrollment in a public school within their respective administrative units of each child residing within such administrative unit qualified under the laws of this State for ad-

mission to a public school and applying for enrollment in or admission to a public school in such administrative unit. Except as otherwise provided in this Act, the authority of each such board of education in the matter of the enrollment of pupils in the public schools within such administrative unit shall be full and complete, and its decision as to the enrollment of any pupil in any such school shall be final. No pupil shall be enrolled in, admitted to, or entitled or permitted to attend any public school in such administrative unit other than the public school in which such child may be enrolled pursuant to the rules, regulations and decisions of such board of education.

Sec. 2. In the exercise of the authority conferred by Section 1 of this Act upon the county or city boards of education, each such board shall provide for the enrollment of pupils in the respective public schools located within such county or city administrative unit so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein enrolled, and the health, safety, and general welfare of such pupils. In the exercise of such authority such board may adopt such reasonable rules and regulations as in the opinion of the board shall best accomplish such purposes.

Sec. 3. The parent or guardian of any child, or the person standing in loco parentis to any child, who shall apply to the appropriate public school official for the enrollment of any such child in or the admission of such child to any public school within the county or city administrative unit in which such child resides, and whose application for such enrollment or admission shall be denied, may, pursuant to rules and regulations established

by the county or city board of education apply to such board for enrollment in or admission to such school, and shall be entitled to a prompt and fair hearing by such board in accordance with the rules and regulations established by such board. The majority of such board shall be a quorum for the purpose of holding such hearing and passing upon such application, and the decision of the majority of the members present at such hearing shall be the decision of the board. If, at such hearing, the board shall find that such child is entitled to be enrolled in such school, or if the board shall find that the enrollment of such child in such school will be for the best interests of such child, and will not interfere with the proper administration of such school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that such child be enrolled in and admitted to such school.

Sec. 4. Any person aggrieved by the final order of the county or city board of education may at any time within ten (10) days from the date of such order appeal therefrom to the superior court of the county in which such administrative school unit or some part thereof is located. Upon such appeal, the matter shall be heard de novo in the superior court before a jury in the same manner as civil actions are tried and disposed of therein. The record on appeal to the superior court shall consist of a true copy of the application and decision of the board, duly certified by the secretary of such board. If the decision of the court be that the order of the county or city board of education shall be set aside, then the court shall enter its order so providing and adjudging that such child is en-

titled to attend the school as claimed by the appellant, or such other school as the court may find such child is entitled to attend, and in such case such child shall be admitted to such school by the county or city board of education concerned. From the judgment of the superior court an appeal may be taken by any interested party or by the board to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions.

Sec. 5. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 6. This Act shall be in full force and effect from and after its ratification.

In the General Assembly read three times and ratified, this the 30th day of March, 1955.

APPENDIX "B".

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Earl Benjamin Bush, et al., Plaintiffs, versus Orleans Parish School Board, et al., Defendants.	No. 3630 Civil Action

A. P. Tureaud Robert L. Carter A. M. Trudeau, Jr. Thurgood Marshall Attorneys for Plaintiffs	Browne & Rault Gerard A. Rault W. Scott Wilkinson Fred S. LeBlanc L. H. Perez Attorneys for Defendants

PER CURIAM:

This class action is brought in behalf of minor children of the Negro race by their parents, guardians or next friends, seeking the aid of the court in obtaining admission to the public schools of Orleans Parish on a non-segregated basis. The complaint alleges the children have been denied admission to schools attended by white children under Article 12, § 1 of the Constitution of Louisiana and Louisiana Acts 555 and 556 of 1954 requiring segregation of the races in public elementary and high schools of the state.

The Supreme Court of the United States in *Brown v. Board of Education*, 349 U. S. 294, in dealing with this identical situation with reference to the states of Kansas, South Carolina, Virginia and Delaware, wrote as follows: "These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference.[1] All provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle." In so far as the provisions of the Louisiana Constitution and statutes in suit require or permit segregation of the races in public schools,[2] they are invalid under the ruling of the Supreme Court in *Brown*.

This three-judge court was convened under 28 U.S.C. § 2281 pursuant to the requests of the parties. It now appears that no serious constitutional question, not heretofore decided by the Supreme Court of the United States, is presented. Accordingly, a three-judge court under 28 U.S.C. § 2281 is not required. *Ex parte Poresky*, 290 U. S. 30. The two judges designated by the Chief Judge of the Circuit to sit with the district judge in the hearing and decision of this case now withdraw from the case, which will proceed in the district court where it was

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[1] The first opinion in **Brown**, in which the constitutional issue was decided, held: "Therefore, we hold that the plaintiffs and others similarily situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." 347 U. S. 483, 495.

[2] Article 12, § 1 of the Louisiana Constitution and Act 555 of 1954 require segregation "in the exercise of the state police power." This provision does not save them from invalidity. See **Mayor and City Council of Baltimore City v. Dawson**, 4 Cir., 220 F. (2d) 386, affirmed 350 U. S. 877.

originally filed. See *Gray v. Board of Trustees of University of Tennessee*, 100 F. Supp. 113, 116; *Lee v. Roseberry*, 94 F. Supp. 324, 328.

/s/ WAYNE G. BORAH
UNITED STATES CIRCUIT JUDGE

/s/ HERBERT W. CHRISTENBERRY
UNITED STATES DISTRICT JUDGE

/s/ J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
February 15, 1956

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Earl Benjamin Bush, et al., Plaintiffs, versus Orleans Parish School Board, et al., Defendants.	No. 3630 Civil Action

A. P. Tureaud Robert L. Carter A. M. Trudeau, Jr. Thurgood Marshall Attorneys for Plaintiffs	Browne & Rault Gerard A. Rault W. Scott Wilkinson Fred S. LeBlanc L. H. Perez Attorneys for Defendants

WRIGHT, District Judge:

This action in equity[1] is brought in behalf of minor Negro plaintiffs, and all Negroes similarly situated,[2] seek-

[1] The jurisdiction of this court is invoked under Section 1331, Title 28, United States Code, this being an action that arises under the Fourteenth Amendment of the Constitution of the United States, Section 1, and Section 1981 of Title 42, United States Code, wherein the matters in controversy exceed the sum and value of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

The jurisdiction of the court is also invoked under Section 1343, Title 28, United States Code, this being an action authorized by Section 1983, Title 42, United States Code, to be commenced by any citizen of the United States, or other person within the jurisdiction thereof, to redress the deprivation, under color of a state law, statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Fourteenth Amendment of the Constitution of the United States, Section 1, and Section 1981 of Title 42, United States Code, which provides for the equal rights of citizens and all persons within the jurisdiction of the United States.

[2] Class action under Rule 23 (a) (3) Fed. R. Civ. P.

ing a declaratory judgment[3] and injunctive relief against the defendants who maintain and operate, pursuant to state statute,[4] the public schools of the Parish of Orleans, Louisiana. Before the court at this time is the application for a temporary injunction.

The public schools of the City of New Orleans are segregated, that is, there are separate schools for white and Negro pupils. Plaintiffs allege that this segregation deprives them of equal protection of the law under the Fourteenth Amendment to the Constitution of the United States, and that under *Brown v. Board of Education of Topeka*, 349 U. S. 294, the defendants should be restrained from continuing this practice. In addition to certain preliminary defenses, defendants contend that pursuant to Article 12, § 1 of the Constitution of Louisiana and Louisiana Acts 555 and 556 of 1954, all enacted subsequent to the decision of the Supreme Court in *Brown*,[5] the public schools of New Orleans are operated on a segregated basis as an exercise of the police power of the state and, therefore, the decision of the Supreme Court in *Brown* outlawing segregation on the basis of race, is not dispositive of the issue here. This contention was considered and rejected by this court, sitting with three judges, in an opinion in this case this day rendered. That opinion is incorporated herein by reference. There remains for disposition then only the preliminary defenses.

In their first preliminary defense, the defendants say that this action is in effect a suit against the State

[3] 28 U. S. C. §§ 2201, 2202.

[4] La. R. S. 17:51.

[5] 347 U. S. 483.

of Louisiana, which has not consented to be sued, and therefore, this court is without jurisdiction. But a suit against officers or agents of a state acting illegally is not a suit against the state.[6] The *Brown* case itself was brought against the Board of Education of Topeka, Kansas, just as the suit here is brought against the state board charged by statute with the administration of public schools. In addition, practically every one of the multitude of school cases which have been litigated through the courts and before the Supreme Court has been brought against state agencies administering the schools. Certainly if there were any lack of jurisdiction, some court along the line, including the Supreme Court, in at least one of the cases would have noticed it, as courts are required to do although the issue is not raised. Moreover, the state statute creating the defendant Board here gives it the right to sue and be sued. La. R. S. 17:51.

Defendants also maintain that the amended complaint should be stricken[7] because it is in the nature of a supplemental complaint and no order of the court was obtained before it was filed. They also make the point that in the amended complaint, James F. Redmond, Superintendent of the Orleans Parish Schools, is made a defendant as successor to O. Perry Walker, Acting Super-

[6] See Georgia R. Co. v Redwine, 342 U. S. 299, and cases therein cited on page 304.

[7] Defendants also contend that the complaint was improperly brought under Rule 17 (c), Fed. R. Civ. P., by the "next friends" of the plaintiff. This contention was considered and rejected in Board of Supervisors of La. State U., etc., v. Tureaud, 5 Cir., 225 F. (2d) 435, affirmed by court en banc January 6, 1956. The complaint here alleges that the "next friends" of plaintiffs are their parents or guardians, so the contention appears pointless in any event.

intendent named defendant in the original complaint, and that the amended complaint was not filed within six months of the time Redmond took office. This point is well taken and the action against the defendant Redmond must be dismissed without prejudice to institution of a new and similar action. Rule 25 (d), Fed. R. Civ. P. The objection to the balance of the amended complaint, however, is highly technical in nature, and even if well taken, would not result in a dismissal of the action, but only in the giving to the plaintiffs time to amend. Rule 15 (a), Fed. R. Civ. P. It need not be disposed of at this time.

Defendants also move to dismiss on the ground that no justiciable controversy is presented by the pleadings. This motion is without merit. The complaint plainly states that plaintiffs are being deprived of their constitutional rights by being required by the defendants to attend segregated schools, and that they have petitioned the defendant Board in vain to comply with the ruling of the Supreme Court in *Brown v. Board of Education of Topeka, supra.* The defendants admit that they are maintaining segregation in the public schools under their supervision pursuant to the state statutes and the article of the Constitution of Louisiana in suit. If this issue does not present a justiciable controversy, it is difficult to conceive of one.

Finally, the defendants contend that the plaintiffs have not exhausted their administrative remedies under Louisiana Act 556 of 1954 and that, consequently, this action must be dismissed. Act 556 of 1954 was part of the legislative plan, enacted subsequent to the Supreme Court's decision in *Brown v. Board of Education of Topeka, supra,*

to avoid the effect of that decision in order to retain segregation in the public schools of the state. Article 12, § 1, of the Louisiana Constitution, passed in 1954, makes segregation through the exercise of police power part of the constitutional law of the state. Act 555 of 1954 implements that constitutional provision by providing that "All public elementary and secondary schools in the State of Louisiana shall be operated separately for white and colored children" and Act 556 of 1954 details the means by which segregation is to be achieved. It provides that "Each Parish Superintendent of Schools, throughout this State, shall, each year, determine the particular public school within each Parish to be attended by each school child applying for admission to public schools," and that no school child shall be entitled to enter a public school unless assigned in accordance with the provisions of the Act. The Act goes on further to provide for a hearing before the school superintendent and the board if there is dissatisfaction with the school assignment of any particular child.[8] For the reasons stated in the opinion of this court sitting with three judges rendered this day, the legislative plan for maintaining segregation in the public schools of Louisiana is invalid. Since the administrative remedy outlined in Act 556 is part of the plan, it is invalid on its face and may be disregarded. *Yarnell v. Hillsborough Packing Co.*, 5 Cir., 70 F. (2d) 435; 42 Am. Jur., Public Administrative Law, § 200. Should Act 556 be considered alone and not part of the over-all legislative plan, then it is invalid as an unlawful delegation of legislative authority for the reason that no standards on which

[8] Act 556 of 1954 also states that persons aggrieved by the ruling of the Board may apply to the state court for relief. This right to apply to the state court for relief is a judicial rather than an administrative remedy. Lane v. Wilson, 307 U. S. 268.

the superintendent may base his assignment of children are included therein. 42 Am. Jur., Public Administrative Law, §§ 42, 43, 44, 45. The only standard for assignment given in the plan is in Act 555 which provides for segregation of the races, which is, of course, invalid under Brown.

As a practical matter, plaintiffs here have exhausted their administrative remedies. They have petitioned the Board on three separate occasions asking that their children be assigned to nonsegregated schools. The Board not only has refused to desegregate the schools, but has passed a resolution noting the existence of the present suit and stating, "It is not only to the manifest interest of this Board and in accord with its expressed policy, but also in furtherance of the public welfare of this community that this suit and any others that might be instituted with the same objective be vigorously, aggressively, and capably defended." To remit each of these minor children and the thousands of other similarly situated to thousands of administrative hearings before this Board, to seek the relief to which the Supreme Court of the United States has said they are entitled, would be a vain and useless gesture, unworthy of a court of equity. It would be a travesty in which this court will not participate.

The granting of a temporary injunction in this case does not mean that the public schools in the Parish of Orleans would be ordered completely desegregated overnight, or even in a year or more. The Supreme Court, in ordering equitable relief in these cases, has decreed that the varied local school problems be considered in each case. The problems attendant desegregation in the deep

South are considerably more serious than generally appreciated in some sections of our country. The problem of changing a people's mores, particularly those with an emotional overlay, is not to be taken lightly. It is a problem which will require the utmost patience, understanding, generosity and forbearance from all of us, of whatever race. But the magnitude of the problem may not nullify the principle. And that principle is that we are, all of us, freeborn Americans, with a right to make our way, unfettered by sanctions imposed by man because of the work of God.

Decree to be drawn by the court.

/s/ J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
February 15, 1956

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Earl Benjamin Bush, et al., Plaintiffs, versus Orleans Parish School Board, et al., Defendants.	No. 3630 Civil Action

A. P. Tureaud
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Attorneys for Plaintiffs

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Gerard A. Rault
W. Scott Wilkinson
Fred S. LeBlanc
L. H. Perez
Attorneys for Defendants

DECREE

This cause came on for hearing on motion of plaintiffs for a temporary injunction in accordance with the decree of the Supreme Court in *Brown v. Board of Education of Topeka*, 349 U. S. 294, and the court, having carefully considered the decision of the Supreme Court, the arguments of counsel and the record heretofore made in this cause:

IT IS ORDERED, ADJUDGED AND DECREED that the defendant, Orleans Parish School Board, a corporation, and its agents, its servants, its employees, their successors in office, and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring and permitting

segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in *Brown v. Board of Education of Topeka, supra.*

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a bond be filed by plaintiffs herein in the sum of One Thousand Dollars ($1,000.00) for the payment of such costs and damages as may be incurred or suffered by any party who is found to be wrongfully enjoined or restrained, said bond to be approved by the Clerk of this Court.

/s/ J. SKELLY WRIGHT
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
February 15, 1956

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Orleans Parish School Board, Appellant, versus Earl Benjamin Bush, et al., Appellees.	No. 16,190

Appeal from the United States District Court for the Eastern District of Louisiana.

(March 1, 1957.)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal in an action on behalf of certain New Orleans Negro school children from a judgment of the District Court for the Eastern District of Louisiana enjoining appellant "from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court in *Brown, et al., v. Board of Education of Topeka, et al.*, 349 U. S. 294."

The principal grounds of appellant's attack on the validity of this order are: (1) This was a suit against the State of Louisiana and is prohibited by the XI Amendment to the Constitution; (2) The complaint failed to state a claim on which relief could be granted; (3) The court erred in holding that the provisions of Art. XII, § 1 of the Louisiana Constitution requiring separate schools for white and colored children and that all of Louisiana Act 555 and Section 1 of 556 of 1954 requiring segregation and assignment of pupils respectively in public schools were invalid; (4) The proof on behalf of plaintiffs and countershowing by defendant did not warrant the issuance of a temporary injunction. These points as well as subsidiary questions will be discussed after a brief statement of the factual background.

On November 12, 1951, appellees petitioned the School Board "to end at once the practice and custom of discriminating against Negro students solely on account of their race and color and admit these Negro children and all others similarly situated to the public schools of Orleans Parish which have heretofore and are now restricted to the enrollment of white children." This petition was denied by official action of the Board on November 26, 1951.[1] On February 19, 1952, an appeal was taken to the State Board of Education; no reply having been received, appellees again, on August 14th, requested action on their petition; on August 27th a reply was received over the signature of the Secretary of the State Board, which while not categorically denying the petition stated:

[1] This action was taken several years before the adoption of the pupil assignment law with its provisions for administrative relief, which will be discussed later.

"The Board feels that many of the items included are wholly within the jurisdiction of the Board."[2] On September 5, 1952, the original complaint in this action was filed. It alleged great disparities between the physical plant and the content of the curricula of Negro and white schools, and also alleged discrimination because of segregation per se. It alleged that the Board was pursuing a policy and custom of maintaining separate schools for white and Negro children under the provisions of Art. XII, Sec. 1 of the Louisiana Constitution. It sought a declaratory judgment on the questions, among others, (a) "whether the policy, custom, practice and usage of defendants . . . in denying on account of race or color to infant plaintiffs and others similarly situated . . . educational opportunities, advantages and facilities . . . equal to the educational opportunities, advantages and facilities afforded and available to white children . . . is unconstitutional and void as being a denial of the equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution of the United States;" (b) "whether Article XII, Sec. 1 of the Constitution of 1921 of the State of Louisiana which prohibits infant plaintiffs from attending the only public schools of Orleans Parish where educational opportunities, advantages and facilities equal to those afforded all other qualified pupils . . . are available and force them to attend secondary schools in Orleans Parish solely because of race and color is unconstitutional and void as a violation of the Fourteenth Amendment of the Constitution of the United States." It also prayed a judgment declar-

[2] The petition had pointed out many alleged inequalities between the facilities in the white and Negro schools. In any event this is either a rejection of the request or a statement that the Parish Board had final jurisdiction.

ing that the separate schools provision of Article XII, Sec. 1 of the Louisiana Constitution is a denial of the equal protection clause of the Fourteenth Amendment and is therefore unconstitutional and void, and for a permanent injunction enjoining defendant Board from following such provision as being in contravention of rights guaranteed under the United States Constitution.

By stipulation proceedings on this complaint were suspended on account of the pendency of the school Segregation cases[3] in the Supreme Court of the United States.

After the first opinion in the Brown case the State Legislature of Louisiana proposed and the people adopted an amendment to Art. XII, Sec. 1 of the State Constitution which had already provided, in effect, that all public elementary and secondary schools should be operated separately for white and colored children by adding that "This provision is made in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the State, and not because of race. The Legislature shall enact laws to enforce the state police power in this regard." The Legislature then promptly enacted Acts 1954, No. 555 and 556. Section 1 of Act 555 merely repeated the constitutional requirement of separate schools. Sections 2, 3 and 4 provide for penalties to be imposed on local boards and an individual failing to observe the requirements as to separate schools in Section 1. Section 5 is a separability

[3] Brown v. Board of Education of Topeka, Kans., 347 U. S. 483 and related cases.

clause.[4] Act 556, adopted at the same time, is the pupil assignment statute. It provides for assignment of each pupil each year by the parish superintendent to a particular school, and, without providing any standards other than those of Act 555 for separation of the races, provides for an appeal to the local board and then to

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[4] Act 555 in full is as follows:

"Separate operation required

"All public elementary and secondary schools in the state of Louisiana shall be operated separately for white and colored children. This provision is made in the exercise of the State police power to promote and protect public health, morals, better education and the peace and good order in the state and not because of race. Acts 1954, No. 555, Section 1.

"Non-recognition of schools violating Sub-part

"The State Board of Education shall not approve any public schools which may violate the provisions of this Sub-part nor shall any of the state colleges or university recognize any certificate of graduation from such public school which may violate the provisions of this Sub-part as entitling the holder thereof to admission. Acts 1954, No. 555, Section 2.

"Schools violating Sub-part to be deprived of supplies and funds

"No free school books or other school supplies shall be furnished, nor shall any state funds for the operation of school lunch programs, or any other school funds be furnished or given to any public elementary or secondary school which may violate the provisions of this Sub-part as above. Acts 1954, No. 555, Section 3.

"Penalty for violations

"Any person, firm or corporation violating any of the provisions of this Sub-part shall be deemed guilty of a misdemeanor and upon conviction therefor by a court of competent jurisdiction for each such violation shall be fined not less than five hundred dollars nor more than one thousand dollars, or sentenced to imprisonment in the parish jail not less than ninety days nor more than six months, or both, fined and imprisoned as above, at the discretion of the court. Acts 1954, No. 555, Section 4.

"In case any part of this Act shall be held to be unconstitutional, this shall not have the effect of invalidating any part of it that is constitutional, and the part or parts not affected by such ruling shall continue in full force and effect. This Act shall be liberally construed to protect and preserve the State Police Power as provided in this Act." Acts of 1954, No. 555, Section 5.

the State Board and thereafter to the state district court.

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[5] Act 556, Sec. 1, in full is as follows:

"ASSIGNMENT OF CHILDREN TO PARTICULAR SCHOOLS BY PARISH SUPERINTENDENT; HEARINGS; REVIEW BOARD; APPEAL

"Each parish superintendent of schools, throughout this state, shall, each year, determine the particular public school within each parish to be attended by each school child applying for admission to public schools. No school child shall be entitled to be enrolled or to enter into a public school until he has been assigned thereto in accordance with the provisions of this Section. In the event of dissatisfaction with the school assignment made by the superintendent, the parents or next of kin to the child affected, within ten days from the date of assignment may apply to the school superintendent for a hearing to have said child assigned to some other public school in the parish, in which case the superintendent shall grant a hearing, and within thirty days after the conclusion of said hearing, the superintendent shall hand down a decision in writing either sustaining his school assignment in question or changing the same. The action of the parish superintendent shall be reviewable by the parish school board upon application of any person paying ad valorem taxes for the support and maintenance of the public schools or on the application of any other party in interest. Any such application for review shall be filed with the parish school board within thirty days from the day the action complained of was taken and within sixty days thereafter, said parish school board hold a hearing at which evidence shall be taken down and transcribed, the cost thereof to be paid for by the party making said application prior to submission of the matter to the school board. The school board shall have the right to require applicant to furnish bond for costs within a reasonable sum, properly secured, prior to the holding of said hearing. The parish school board shall consider the evidence so adduced and as soon as practicable render its decision in writing. Any person, having applied for and secured a hearing by the parish school board who feels aggrieved by the ruling of said board shall have the right to apply to the district court of the domicile of the said board and the right to appeal from the judgment of the district court to the appropriate court of appeal, provided, however, that such right to apply to the district court shall not exist until said party shall have complied with the provisions hereof, and shall have exhausted the administrative remedies provided for herein.

"Each school board throughout the state shall have authority to adopt rules and regulations governing the hearing and appeals provided for herein.

"Wherever reference is made to parish superintendent of schools or school boards the same shall apply to those in the cities of Monroe, Bogalusa and Lake Charles. Added Acts 1954, No. 556, § 1."

Following the enactment of these laws, appellees petitioned the school board to take immediate steps to reorganize the schools under its jurisdiction on a nondiscriminatory basis. No reply was made to this or to a subsequent petition, but the board engaged counsel to "defend, as special attorney for the Board, both in the trial court and in the Courts of Appeal" the action then pending.[6] Soon thereafter appellees filed a first amended complaint setting up the provisions of the amended constitution and the newly enacted statutes, a prayer for declaratory relief holding them invalid and renewing their prayer for preliminary and permanent injunction against the enforcement by the board of the provisions of the new laws.

The defendant board filed its motion to dismiss and the State of Louisiana prayed the right to intervene solely for the purpose of filing a motion to dismiss the suit as being one against the State. No order appears to have been entered allowing this intervention and the State is not appearing as a party on this appeal, although a brief has been tendered on behalf of the State as amicus curiae. Its petition for leave to file hereby granted and its brief has been considered by the Court.

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[6] The resolution stated it to be the policy of the board to maintain its policy of segregation by the language in the following "Whereas" clauses:

"WHEREAS a class action has been instituted in the United States District Court for the Eastern District of Louisiana by Earl Benjamin Bush and others against the Orleans Parish School Board and its superintendent demanding a preliminary and ultimately a permanent injunction against the segregation of the races in the public schools of New Orleans;

"WHEREAS it is not only to the manifest interest of this Board and in accord with its expressed policy, but also in furtherance of the public welfare of this community that this suit and any others that might be instituted with the same objective be vigorously, aggressively, and capably defended;"

NATURE OF THE SUIT

We consider first whether there is any merit in appellant's contention that this is in fact a suit brought by citizens of the State of Louisiana against the State. Of course such a suit is prohibited by the principle of sovereign immunity and by analogy to the Eleventh Amendment to the Constitution of the United States. *Hans v. Louisiana*, 134 U. S. 1.

It would seem hardly worth our considering this contention in light of the fact that all of the School Segregation Cases were actions of the same type as the one before us (suits against a state official or board operating under State authority) were it not for the fact that both the appellant and the Attorney General of the State urge it so strongly upon us. The burden of their argument is that this is a suit to compel State action, which under a long line of cases, including *Great Northern Life Insurance Company v. Reed*, 322 U. S. 47, and *Ford Motor Company v. Treasury Department*, 323 U. S. 459, falls within the prohibition whether nominally against the State or against State officials. But this suit does not seek to compel state action. It seeks to prevent action by State officials which they are taking because of the requirements of a State constitution and laws challenged by the plaintiffs as being in violation of their rights under the Federal Constitution. If in fact the laws under which the board here purports to act are invalid, then the board is acting without authority from the State and the State is in nowise involved. That a federal court can entertain a suit where such a situation is alleged has long been

recognized. In Ex parte Young, 209 U. S. 123, the Supreme Court said in such a case as this:

> ". . . It is contended that the complainants do not complain and they care nothing about any action which Mr. Young might take or bring as an ordinary individual, but that he was complained of as an officer, to whose discretion is confided the use of the name of the State of Minnesota so far as litigation is concerned, and that when or how he shall use it is a matter resting in his discretion and cannot be controlled by any court.
>
> "The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a State official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the State Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from

responsibility to the supreme authority of the United States."

Central of Georgia Railroad v. Redwine, 342 U. S. 299, relied on by the trial court, is the most recent pronouncement of the Supreme Court to the same effect. See also *School Board of the City of Charlottesville v. Allen* (4th cir.), ___ F. (2d) ___ (dec. Dec. 31, 1956), where the Court of Appeals for the Fourth Circuit held a suit such as this not to be one against the State of Virginia.

There is no merit in the claim of appellant that the court was without jurisdiction to try this case as being a suit against the State. The substance of this suit is that the school board is unconstitutionally forcing them to attend schools that are segregated according to race and their prayer is that the board be enjoined from continuing to do so. If plaintiffs are right in their contention, then they can obtain complete relief from this defendant, because any sanctions compelling it to continue its illegal conduct falls when the Court determines that such sanctions are illegal.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

The second ground of appellant's motion to dismiss was its contention that the complaint fails to state a claim on which relief can be granted. The first basis for this attack is that, assuming all the allegations as to unconstitutional acts by the defendant to be true, the plaintiffs have not pursued their administrative remedies for relief before filing of their suit. In asserting this contention appellant seems to overlook completely the fact that when this suit was filed there was no pupil assignment law on the statute books. So far as has been called to

our attention the plaintiffs did all they were required to do administratively in 1951 to seek relief from the condition of which they were complaining, i. e., inequality and discrimination between the facilities of white and colored schools and the discrimination resulting per se from the operation of a segregated school system. They applied to the defendant for relief and appealed its adverse decision to the State board which remanded them to the local board. Where else they could go administratively is nowhere suggested by appellant, which argues the entire matter as though there had then been a pupil assignment statute on the books.

But assuming that the trial court and we should view this question in the light of conditions after the passage of the 1954 acts, which, however, we do not decide, there is still no merit in appellant's argument. Appellees were not seeking specific assignment to particular schools. They, as Negro students, were seeking an end to a local school board rule that required segregation of all Negro students from all white students. As patrons of the Orleans Parish school system they are undoubtedly entitled to have the district court pass on their right to seek relief. *Jackson v. Rawdon* (5th Cir.), 235 F. (2d) 93, cert. den., 352 U. S. 925, and see *School Board of the City of Charlottesville v. Allen, supra.*

Moreover, so long as assignments could be made under the Louisiana constitution and statutes only on a basis of separate schools for white and colored children to remit each of these minor plaintiffs and thousands of others similarly situated to thousands of administrative hearings before the board for relief that they contend the Supreme

Court has held them entitled to, would, as the trial judge said, "be a vain and useless gesture, unworthy of a court of equity, . . . a travesty in which this court will not participate." See *Adkins v. Newport News School Board*, (D. C., E. D. Va.), decided 1/11/57, 25 L. W. 2317.

PROOF OF ACTUAL OR IMMEDIATE IRREPARABLE INJURY

A further basis for appellant's claim that the suit should be dismissed was that there was no showing of actual or immediate irreparable injury. It may well be argued to the contrary that, assuming that plaintiffs are being denied their constitutional right to equality with members of the white race in their educational opportunities, every day that passes counts as an irreparable loss to the school child thus discriminated against. The simplest answer to this contention, however, is in the limited action of the court, which was well within what was prayed for by appellees. It declared the rights of the parties as they prayed and restrained the board from "requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in *Brown v. Board of Education of Topeka, supra.*"

Such an order, while in the form of a preliminary injunction, contained no immediately compulsive features so far as relieving the plaintiffs of day by day injury was concerned. Inasmuch as they do not complain of the failure of the court to afford them immediate relief

it seems to us that there is little ground for the board to do so on this particular ground.

CONSTITUTIONALITY OF LOUISIANA CONSTITUTION AND LAWS

We have heretofore dealt with contentions advanced by appellant which it says entitle it to a dismissal of the action whether or not the plaintiffs are being denied their constitutional rights. We now come to the question whether under the statutes of Louisiana enacted pursuant to the amendment to that State's constitution the legal position of the parties here differs from that which the litigants occupied in the School Segregation case, *supra*. Obviously if nothing new or different has been added the plaintiffs are entitled to a declaratory judgment declaring their right "to have the school board, acting promptly, and completely uninfluenced by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration" to abolish segregation in the Orleans Parish school system. (*Jackson v. Rawdon, supra*, at 235 F. (2d) 96).

The new circumstance to which appellant points is the amendment to the Louisiana constitution which, in effect, provides that there shall continue to be racially separate schools, which separation is stated for the first time to be "in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the State, and not because of race." There is also the new pupil assignment law which we have already discussed.

Appellant nowhere in its brief undertakes to explain the process of reasoning by which it seeks to have this Court conclude that racial segregation in the schools is any less segregation "because of race" merely because the stated basis of adhering to the policy is in the exercise of the State's police power. Nor does the brief filed by the Attorney General of Louisiana discuss the issue. However, the affidavits introduced on the hearing for preliminary injunction make clear what the briefs do not. They deal with the alleged disparity between the two races as to intelligence ratings, school progress, incidence of certain diseases, and percentage of illegitimate births, in all of which statistical studies one race shows up to poor advantage. This represents an effort to justify a classification of students by race on the grounds that one race possesses a higher percentage of undesirable traits, attributes or conditions. Strangely enough there seems never to have been any effort to classify the students of the Orleans Parish according to the degree to which they possess these traits. That is, there seems to have been no attempt to deny schooling to, or to segregate from other children, those of illegitimate birth or having social diseases or having below average intelligence quotients or learning ability because of those particular facts. Whereas any reasonable classification of students according to their proficiency or health traits might well be considered legitimate within the normal constitutional requirements of equal protection of the laws it is unthinkable that an arbitrary classification by race because of a more frequent identification of one race than another with certain undesirable qualities would be such reasonable classification.

The use of the term police power works no magic in itself. Undeniably the States retain an extremely broad police power. This power, however, as everyone knows, is itself limited by the protective shield of the Federal Constitution. Thus, for instance, municipal zoning laws passed to require racially segregated residential zoning have been struck down under the Fourteenth Amendment. In *Buchanan v. Warley*, 245 U. S. 60, the Supreme Court said at page 74:

> "The authority of the State to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad as has been affirmed in numerous and recent decisions of this court. Furthermore, the exercise of this power, embracing nearly all legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose. But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution; that principle has been so frequently affirmed in this court that we need not stop to cite the cases."

To the same effect see the Georgia case of *Carey v. City of Atlanta*, 143 Ga. 192.

Probably the most clear cut answer to this effort by the State of Louisiana to continue the pattern of segregated schools in spite of the clear and unequivocal pronouncement of the Supreme Court in the School Seg-

regation cases[7] is that this is precisely what was expressly forbidden by those decisions. Whatever may have been thought heretofore as to the reasonableness of classifying public school pupils by race for the purpose of requiring attendance at separate schools, it is now perfectly clear that such classification is no longer permissible, whether such classification is sought to be made from sentiment, tradition, caprice, or in exercise of the State's police power.

From what we have said the conclusion is obvious that the State constitutional provisions as to maintaining separate schools for white and colored children is in direct conflict with the equal protection clause of the Fourteenth Amendment and is void and of no effect. The same is true of the statute designed to implement this constitutional requirement, Act 555 of 1954.

We next come to the Pupil Assignment Law. Although we have already expressed the view that this stat-

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7 "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment."

Brown v. Board of Education, 347 U. S. 483, at 495.

"These cases were decided on May 17, 1954. The opinion of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded." Brown v. Board of Education, 349 U. S. 294, at 298.

ute did not have the effect of preventing the commencement and maintenance of this action, the role it might have in the future disposition of the case by the trial court makes it appropriate for us to answer appellant's contention that that court erred in holding it invalid.

Whatever might be the holding as to the validity of an administrative pupil assignment statute containing reasonably certain or ascertainable standards to guide the official conduct of the superintendent of the local school board and to afford the basis for an effective appeal from arbitrary action, Act 556 is not such a statute. The plaintiffs, seeking to assert their right to attend non-segregated schools as guaranteed them under the Constitution, would be remitted to an administrative official guided by no defined standards in the exercise of his discretion.[8] In such circumstances no number of hearings or appeals would avail them anything because it would be impossible for them to bring forward any proof bearing on whether they possessed those attributes, qualifications, or characteristics that would bring them within the group of students permitted to attend the particular school or schools. Attempts by statute to give any official the power to assign students to schools arbitrarily according to whim or caprice are legally impermissible, especially if considered in light of the history of assignments made in a manner that has now been held to be unconstitutional and of the recently readopted requirement of the State constitution reaffirming such unconstitutional standards, which is reinforced by the heavy sanctions against any official permitting a departure there-

[8] Cf. Carsen v. Warlick (4 Cir.), . . . F. (2d) . . . 25 U. S. L. W. 2252 (Nov. 14, 1956); the North Carolina Pupil Enrollment Act there involved was held by the court to contain adequate standards.

from contained in a companion statute. Such a statute is unconstitutional either because it has on its face the effect of depriving appellees of their liberty or property without due process of law or as having implied as its only basis for assignments the prohibited standard of race. See *Yick Wo v. Hopkins*, 118 U. S. 356, and *Davis v. Schnell* (S. D. Ala., 3-judge court), 81 F. Supp. 872, aff'd, 336 U. S. 933. Thus we need not determine whether the enactment of this law contemporaneously with Act 555 and closely following the readoption of the racially separate schools provision of the State constitution, under circumstances that make it plain to all that the Assignment Act too was a further effort to stave off the effect of the Supreme Court's school decision, is sufficient of itself to condemn it as part of the illegal legislative plan comprehended in Act 555, although this is precisely the type of determination on which the three-judge court in *Davis v. Schnell*, *supra*, based its decision striking down an amendment to the Alabama constitution.[9] Nor is it necessary for us to pass on the possible validity of a statute that would merely grant to school officials the power to promulgate rules of attendance, zoning of school population, transfers and the like, so long as all such rules are applied in a manner as to affect all pupils without regard to their race, and are not used as a mere screen to perpetuate compulsorily segregated schools contrary to the court's order.[10]

There remains the complaint of the appellant that this is not truly a class action. What we have heretofore

[9] See also Adkins v. Newport News School Board (E. D. Va.), 25 U. S. L. W. 2316 (Jan. 11, 1957).

[10] See City of Charlottesville v. Allen, supra, and Carsen v. Warlick, supra.

said with respect to the nature of the relief sought makes it clear that there is no merit in this contention. Here is a well-defined class whose rights are sought to be vindicated. We think that our decisions in *Lucy v. Adams* (5th Cir.), 228 F. (2d) 619, cert. den., 351 U. S. 931, and *Board of Supervisors of L. S. U. v. Tureaud*, (5th Cir.), 225 F. (2d) 434 (aff'd en banc), 228 F. (2d) 895, cert. den., 351 U. S. 924, by clearest implication reject appellant's contention that in such a situation the named plaintiffs may not bring a class action on behalf of themselves and all others similarly situated. See also *Carter v. School Board of Arlington County, Va.* (4th Cir.), 182 F. (2d) 531, and *Frazier v. Board of Trustees of the University of North Carolina*, 134 F. Supp. 589, aff'd per curiam, 350 U. S. 979.

Moreover, it is worthy of note that the series of cases generally known as the School Segregation cases[11] themselves were all class actions in the same sense as is the one before us.

In sum, therefore, we find no basis for the appellant's attack on the order entered by the trial court. The able and experienced trial judge gave full recognition to the administrative difficulties attendant upon changing the schools of the Parish of Orleans, including as it does, the schools of the City of New Orleans, from the established pattern of segregation on account of race. Although requiring immediate acceptance of the principle of non-segregated schools he allowed the Board time to put it into effect. Clearly implying that arrangements should be started at once, he nevertheless fixed the date after which there were to be no further distinction based on

[11] Brown v. Board of Education of Topeka, Kansas, supra.

race at "such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court in *Brown v. Board of Education.*"

It is evident from the tone and content of the trial court's order and the willing acquiescence in the delay by the aggrieved pupils that a good faith acceptance by the school board of the underlying principle of equality of education for all children with no classification by race might well warrant the allowance by the trial court of time for such reasonable steps in the process of desegregation as appears to be helpful in avoiding unseemly confusion and turmoil. Nevertheless whether there is such acceptance by the Board or not, the duty of the court is plain. The vindication of rights guaranteed by the Constitution can not be conditioned upon the absence of practical difficulties. However undesirable it may be for courts to invoke Federal power to stay action under State authority, it was precisely to require such interposition that the Fourteenth Amendment was adopted by the people of the United States. Its adoption implies that there are matters of fundamental justice that the citizens of the United States consider so essentially an ingredient of human rights as to require a restraint on action on behalf of any State that appears to ignore them.

The orders of the trial court are

AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 16,190

ORLEANS PARISH SCHOOL BOARD

Appellant,

versus

EARL BENJAMIN BUSH, ET AL.,

Appellees.

SUGGESTION AND REQUEST FOR EN BANC CONSIDERATION OF APPLICATION FOR REHEARING AND FOR EN BANC REHEARING AND BRIEF IN SUPPORT THEREOF.

APPLICATION FOR REHEARING EN BANC.

Now comes the appellant in the above entitled cause under authority of 28 U. S. C. 46 (c) and suggests and requests that all the active judges of this Court be convened en banc to entertain the application for rehearing filed herein for the following reason, to-wit:

The special circumstances and important implications of the decision herein require the adequate hearing

and full deliberation of the entire Court, all as will appear by brief in support of this suggestion which has been filed herein and follows hereafter.

Respectfully submitted,

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BRIEF IN SUPPORT OF SUGGESTION THAT THE APPLICATION FOR REHEARING AND THE REHEARING BE CONSIDERED BY THE COURT EN BANC.

The leading case in support of the en banc powers of the circuit courts as conferred by 28 U. S. C. 46 (c) is *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U. S. 247, 97 L. Ed. 983, 73 S. Ct. 656 (1952) in which Mr. Chief Justice Vinson as the organ of the court stated as follows:

> "It is also essential that litigants be left free to suggest to the court, or to the devision—depending upon where power of initiation resides, as determined by the active circuit judges of the court—that a particular case is appropriate for consideration by all the judges. A court may take steps to use the en banc power sparingly, but it may not take steps to curtail its use indiscriminately. Counsel are often well equipped to point up special circumstances and important implications calling for en banc consideration of the cases which they ask the court to decide."

The Supreme Court in the above cited case does not detail the essentials which would appropriately call for an en banc hearing by a circuit court. However, the court does indicate as shown by the above quotation that "special circumstances and important implications" may call for en banc consideration.

The present case is certainly one of special circumstances and quite obviously most important implications

will result from the opinion heretofore issued herein by this court. They may be stated as twofold in nature, the first affecting the entire population of the city of New Orleans, both Negro and white. As pointed out in briefs heretofore submitted to this Court both by the Attorney General of the State of Louisiana in his *Amicus Curiae* Brief and by counsel for appellant the decision rendered in this case will have devastating effects upon the public school system in the Parish of Orleans. Under the provisions of Louisiana Revised Statutes 17:133 the State of Louisiana, which supplies approximately 50% of the revenue on which the Orleans Parish public schools operate would, upon the injunction herein becoming effective, withhold all further educational funds from this Parish with a devastating effect on its public school system. Certainly this fact alone would warrant the adequate hearing and full deliberation that would be achieved as a result of a hearing by the full membership of this Court.

The second implication of the decision issued by this Court herein is the invasion of the sovereignty of the State of Louisiana and the wholesale holding of provisions of her organic law and her statutes unconstitutional, as being violative of the Fourteenth Amendment which we submit was never constitutionally proposed, nor ratified, all as will appear more fully in brief in support of the motion for rehearing. This situation alone should make clear the necessity for an en banc determination of the application for rehearing filed herein.

Accordingly, it is respectfully urged that the Court meet en banc for the purpose of determining whether the

application for rehearing filed herein should be granted, and if granted, that the rehearing be heard by the Court en banc.

Respectfully submitted,

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Attorneys for Appellant.

CERTIFICATE OF COUNSEL.

The undersigned attorney of record for appellant, Orleans Parish School Board certifies that the foregoing suggestion and request for consideration of application for rehearing en banc and brief in support thereof is not presented for purposes of delay but is in his opinion well founded in law and fact and proper to be filed herein.

.....

GERARD A. RAULT,
Attorney for Orleans Parish
School Board, Appellant herein.

CERTIFICATE OF SERVICE.

I certify that on this day I have served copies of the foregoing suggestion and request for consideration of application for rehearing en banc and brief in support thereof on counsel for appellees.

Dated this .... day of March, 1957.

.....

GERARD A. RAULT,
Attorney for Appellant,
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New Orleans, Louisiana.